

# SIEMENS

PATENT  
Attorney Docket No. 2002P10529WOUS

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Inventor:	Hans-Jürgen Karnatz et al.	)	
		)	Group Art Unit: 2445
Serial No.:	10/527,433	)	
		)	Examiner: Bhatia, Ajay M
Filed:	10/17/2005	)	Confirmation No. 5407

Title: UPDATING OF SOFTWARE STORED ON A COMPUTER OF A DATA  
COMMUNICATION SYSTEM

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Sir:

### APPELLANT'S BRIEF UNDER 37 CFR 41.37

This brief is in furtherance of the Notice of Appeal filed concurrently with this paper.

1. REAL PARTY IN INTEREST - 37 CFR 41.37(c)(1)(i)

The real party in interest in this Appeal is the assignee of the present application,  
Siemens Aktiengesellschaft.

2. RELATED APPEALS AND INTERFERENCES - 37 CFR 41.37(c)(1)(ii)

To the best of our knowledge, there is no other appeal, interference or judicial proceeding that is related to or that will directly affect, or that will be directly affected by, or that will have a bearing on the Board's decision in this Appeal.

3. STATUS OF CLAIMS - 37 CFR 41.37(c)(1)(iii)

Claims pending: Claims 24-29 and 32-44.

Claims cancelled: 1-23, 30 and 31.

Claims withdrawn but not cancelled: none

Claims allowed: none

Claims rejected: Claims 24-29 and 32-44.

Claims on appeal: Claims 24-29 and 32-44.

4. STATUS OF AMENDMENTS - 37 CFR 41.37(c)(1)(iv)

A request for reconsideration with arguments but no claim amendments was filed under 37 CFR 1.116 and was considered by the Examiner. The final rejection of the claims was maintained.

5. SUMMARY OF THE CLAIMED SUBJECT MATTER- 37 CFR 41.37(c)(1)(v)

Independent claim 24 is directed to a data communication system 1 (FIG. 1) for updating a software stored in a storage device (e.g., storage devices 8, 18, 28) of a first computer. See page 3, lines 1-7 of paragraph 14 of the disclosure of the present invention (Substitute Specification). The system includes an administrative computer 31 for updating the software. See page 8, lines 1-5 of paragraph 44 of the disclosure. The system further includes an indicator indicating a plurality of transmission media available for updating software that is exchanged between the first computer and the administrative computer prior to the update. See page 10, lines 3-5 of paragraph 52 of the disclosure. A control software is configured to compare a respective data rate provided by respective ones of the plurality of transmission media available for updating software. The control software is further configured to select one of the plurality of transmission media based on a result of the data rate comparison. See page 11, lines 1-5 of paragraph 56 of the disclosure. A data connection is used to operatively connect the first

computer and the administrative computer via the selected transmission medium to transmit data between the computer and the administrative computer. See page 11, lines 1-4 of paragraph 57 of the disclosure.

Independent claim 43 is directed to a first computer in a data communication system 1 (FIG. 1) that includes a processor. A storage device (e.g., storage devices 8, 18, 28) is operatively connected to the processor. A first data connection is operatively connected to a server computer over a transmission medium for exchanging data for updating a first software. The transmission medium is ascertained by the computer prior to establishing the first connection. See page 10, lines 3-5 of paragraph 52 of the disclosure. The ascertaining of the transmission medium comprises a comparison of a respective data rate provided by respective ones of a plurality of transmission media available for updating software, and further comprises selecting the transmission medium for updating software based on a result of the data rate comparison. See page 11, lines 1-5 of paragraph 56 of the disclosure. A second software is used to control the first software update. The second software is exchanged between an administrative computer and the first computer. A call identification of the first computer is selected from the group consisting of telephone number, internet protocol address, and uniform resource locator address. . See page 11, lines 4-9 of paragraph 57 of the disclosure. A time indicator indicates a time to update the first software by the second software. See page 12, lines 1-2 of paragraph 60 of the disclosure.

Independent claim 44 is directed to a method for updating software stored on a first computer of a data communication system 1 (FIG. 1) having an administrative computer 31 and a server first computer. The method allows indicating for a plurality of transmission media available for exchanging data between the first computer and the administrative computer. The indication occurs prior to the updating the software stored on the first computer. See page 10, lines 3-5 of paragraph 52 of the disclosure. The method further allows comparing a respective data rate provided by respective ones of the plurality of transmission media available for updating software. One of the plurality of transmission media available for updating software is selected based on a result of the data rate comparing. See page 11, lines 1-5 of paragraph 56 of the disclosure. A data connection is established between the first computer and the additional server first computer over the transmission medium. See page 11, lines 1-4 of paragraph 57 of the disclosure.

6. GROUNDS OF REJECTION TO BE REVIEWED UPON APPEAL - 37 CFR 41.37(c)(1)(vi)

A) Whether claims 24-29 and 32-44 stand rejected under 35 U.S.C. 103(a) as being unpatentable over US patent No. 6,378,069 (hereinafter Sandler) in view of US patent No. 6,470,378 (hereinafter Tracton).

7. ARGUMENT 37 CFR 41.37(c)(1)(vii)

A. Regarding the rejection of claims 24-29 and 32-44 under 35 U.S.C. 103(a) as being unpatentable over Sandler in view of Tracton.

Appellant argues that the Sandler/Tracton combination does not constitute an appropriate *prima facie* combination for renderings claims 24-29 and 32-44 unpatentable because it fails to describe or suggest each of the structural and/or operational relationships of the claimed invention, as discussed in greater detail below.

M.P.E.P. 2143.04 provides that to establish *prima facie* obviousness of a claimed invention, all the claims limitations must be taught or suggested by the prior art. All words in a claim must be considered for judging the patentability of the claim against the prior art. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending there from is nonobvious.

The Examiner correctly acknowledges that Sandler fails to describe or suggest each of the structural and/or operational relationships of the claimed invention. More particularly, the Examiner acknowledges that Sandler fails to disclose or suggest the claim 24 limitations of "a control software configured to compare a respective data rate provided by respective ones of the plurality of transmission media available for updating software . . . to select one of the plurality of transmission media based on a result of the data rate comparison."

The Office Communication then applies Tracton to purportedly remedy the acknowledged deficiencies of Sandler regarding the claimed invention. However, as discussed in greater detail below, Tracton fails to remedy the deficiencies of Sandler regarding the claimed

invention. Consequently, the Sandler/Tracton combination fails as a *prima facie* combination for sustaining a §103 rejection of the claimed invention and the rejections should be withdrawn.

Tracton is directed to servicing a client having specific computing capabilities in a client-server environment. A request from the client is satisfied based on the specific computing capabilities of the client. See Abstract of Tracton. See also Summary of Tracton at col. 3. For example, Tracton describes that a client with insufficient computing resources may not be able to process complex video data. See Tracton at col. 2, line 29 et. seq. Accordingly, Tracton describes at col. 5, line 5 et. seq. that data sent to the client is configured based on the computing capabilities of the client. For example, the data may have to be sent at a slower rate or may be sent in simpler encoding format to allow the computing resources of the client to keep up with the received data.

One skilled in the art will appreciate that the problem purportedly solved by Tracton has little to do with the claimed invention. Firstly, one skilled in the art would appreciate that identifying the specific computing capability of a given client (Tracton col. 3, line 58) is inapposite to control software configured to compare a respective data rate provided by respective ones of the plurality of transmission media available for updating software. Secondly, one skilled in the art would further appreciate that providing capability-tailored data (Tracton col. 4, line 12) is inapposite to configuring the control software to select one of the plurality of transmission media based on a result of the data rate comparison. The stated object of Tracton is the ability to tailor the data transmitted to a client in order to meet the specific computing capabilities of the client. One skilled in the art will appreciate that the claimed invention has virtually no logical nexus to the stated object of Tracton. The Examiner in the Advisory Action dated 12/02/2008 states that Appellant argues the type of content carried by Tracton. Appellant respectfully points out that the arguments presented have little to do with the type of content carried by Tracton but have to do with the structural and/or operational relationships of the claimed invention relative to the disclosure of Tracton. One skilled in the art will recognize that Tracton is directed to first recognizing the specific computing capabilities of any given client so that the data transmitted to that client appropriately meets the computing capabilities of the client. The claimed invention (for example claim 24) is not concerned with the computing capabilities of the client but is concerned with selecting "one of the plurality of transmission media based on a result of the data rate comparison" among the available transmission media.

This results in establishing a data connection via the selected transmission medium to transmit data between the computer and the administrative computer. One skilled in the art would recognize that transmission media (e.g., the internet, an intranet, telephone network or even a satellite link) as may be available to the public at large is outside the realm of the computing resources of a given user.

In view of the foregoing considerations, it is believed that the Examiner has not appropriately demonstrated, as required by the applicable statutory requirements, that Tracton in fact remedies the acknowledged deficiencies of Sandler regarding the claimed invention, and consequently, the Sandler/Tracton combination fails to teach each of the structural and/or operational relationships of the claimed invention. Therefore, such a combination fails as a *prima facie* combination for sustaining a §103 rejection of the claimed invention and the rejection of claim 24 and claims depending there from should be withdrawn.

Independent claim 43 is directed to a first computer in a data communication system and independent claim 44 is directed to a method for updating software. Since the Sandler/Tracton combination, as discussed above, fails to describe or suggest each of the structural and/or operational relationships of the claimed invention, Applicant respectfully requests that the Board similarly withdraw the Section 103 rejections of independent claims 43 and 44.

8. CLAIMS APPENDIX - 37 CFR 41.37(c) (1) (viii).

A copy of the claims involved in this appeal is attached as a claims appendix under 37 CFR 41.37(c) (1) (viii).

9. EVIDENCE APPENDIX - 37 CFR 41.37(c) (1) (ix)

None is required under 37 CFR 41.37(c) (1) (ix).

10. RELATED PROCEEDINGS APPENDIX - 37 CFR 41.37(c) (1) (x)

None is required under 37 CFR 41.37(c) (1) (x).

Serial No. 10/527,433  
Atty. Doc. No. 2002P10529WOUS

Respectfully submitted,

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APPENDIX OF CLAIMS ON APPEAL

24. A data communication system for updating a software stored in a storage device of a first computer, comprising

- an administrative computer for updating the software;
- an indicator indicating a plurality of transmission media available for updating software that is exchanged between the first computer and the administrative computer prior to the update;
- a control software configured to compare a respective data rate provided by respective ones of the plurality of transmission media available for updating software, the control software further configured to select one of the plurality of transmission media based on a result of the data rate comparison; and
- a data connection operatively connecting the first computer and the administrative computer via the selected transmission medium to transmit data between the computer and the administrative computer.

25. The data communication system according to claim 24, wherein the indicator is exchanged over a predetermined transmission medium.

26. The data communication system according to claim 25, wherein the predetermined transmission medium is different from the transmission medium.

27. The data communication system according to claim 25, wherein the predetermined transmission medium is a telephone connection.

28. The data communication system according to claim 24, wherein the transmission medium is an internet connection or a telephone connection.



29. The data communication system according to claim 28, wherein the internet connection is fixed and an IP address assigned to the first computer is a fixed IP, or the internet connection is temporary and an IP address assigned to the first computer is a temporary IP address.

32. The data communication system according to claim 24, wherein the control software indicates a time to perform the software update.

33. The data communication system according to claim 24, wherein the control software indicates a call identification that is assigned to the additional first computer, the call identification selected from the group consisting of telephone number, internet protocol address, and uniform resource locator address.

34. The data communication system according to claim 24, wherein a second transmission medium for exchanging data between the first computer and the additional first computer is conveyed via the control software.

35. The data communication system according to claim 34, wherein the second transmission medium is the same as the predefined transmission medium.

36. The data communication system according to claim 34, wherein the second transmission is different than the transmission medium and the predefined transmission medium.

37. The data communication system according to claim 34, wherein a file for updating software is stored on the additional server and wherein the file first computer is transmitted to the first computer over the second transmission medium.

38. The data communication system according to claim 37, wherein the additional first computer is a trivial file transfer protocol server first computer or a web server first computer.

39. The data communication system according to claim 24, wherein the first computer is a telecommunication system.

40. The data communication system according to claim 24, wherein the software to be updated is a communication-control software.

41. The data communication system according to claim 24, wherein the first computer is part of a first data network and functions as a central first computer for the first data network.

42. The data communication system according to claim 24, wherein the first data network is connected to a second data network forming an aggregate network and wherein the first computer initiates updating the software stored on a second computer in the second network.

43. A first computer in a data communication system, comprising:
- a processor;
  - a storage device operatively connected to the processor;
  - a first data connection operatively connected to a server computer over a transmission medium for exchanging data for updating a first software, the transmission medium ascertained by the computer occurring prior to establishing the first connection, wherein the ascertaining of the transmission medium comprises a comparison of a respective data rate provided by respective ones of a plurality of transmission media available for updating software, and further comprises selecting the transmission medium for updating software based on a result of the data rate comparison;
  - a second software controlling the first software update, the second software exchanged between an administrative computer and the first computer;
  - a call identification of the first computer selected from the group consisting of telephone number, internet protocol address, and uniform resource locator address; and
  - a time indicator indicating a time to update the first software by the second software.

44. A method for updating software stored on a first computer of a data communication system having an administrative computer and a server first computer, comprising:

indicating a plurality of transmission media available for exchanging data between the first computer and the administrative computer, the indication occurring prior to the updating the software stored on the first computer;

comparing a respective data rate provided by respective ones of the plurality of transmission media available for updating software;

selecting one of the plurality of transmission media available for updating software based on a result of the data rate comparing; and

establishing a data connection between the first computer and the additional server first computer over the transmission medium.

Serial No. 10/527,433  
Atty. Doc. No. 2002P10529WOUS

EVIDENCE APPENDIX

None.

Serial No. 10/527,433  
Atty. Doc. No. 2002P10529WOUS

RELATED PROCEEDINGS APPENDIX

None.